APPENDIX A

SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD

v.

CELANESE CORP. OF AMERICA

No. 382. Decided February 20, 1961.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals for consideration in the light of *Labor Board* v. *Mattison Machine Works*, No. 74, October Term, 1960, decided January 23, 1961.

MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be denied.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD

v.

MATTISON MACHINE WORKS.

No. 74. Decided January 23, 1961

PER CURIAM.

The judgment of the Court of Appeals is reversed and the case remanded to that court for the entry of a decree enforcing the Board's order. The refusal of the Court of Appeals to enforce that order because the Board's notices of election contained a minor and unconfusing mistake in the employer's corporate name, was plain error. It was well within the Board's province to find, as it did, upon the record before it that this occurrence had not affected the

fairness of the representation election, particularly in the absence of any contrary showing by the employer upon whom the burden of proof rested in this respect. That finding should have been accepted by the Court of Appeals. In the absence of proof by the employer that there has been prejudice to the fairness of the election such trivial irregularities of administrative procedure do not afford a basis for denying enforcement to an otherwise valid Board order.

Judgment reversed and cause remanded.

APPENDIX C

130 NLRB No. 99 D-1928
Greenville, Miss.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 26-RC-1407

UNITED STATES GYPSUM COMPANY, *Employer*

and

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner*

Supplemental Decision, Order and Direction of Second Election

Pursuant to a Decision and Direction of Election[1] issued by the Board on June 15, 1960, an election by secret ballot was conducted on July 8, 1960, under the direction and supervision of the Regional Director for the Twenty-Sixth Region among the employees in the appropriate unit.[2] Fol-

[1] Not reported in printed volumes of Board Decisions.

[2] The unit as stipulated by the parties and found appropriate by the Board is: All production and maintenance employees at the Employer's insulation board, hardboard, hardboard products and insulation tile manufacturing plant at Greenville, Mississippi, including press operators and quality leaders in Press Board department, chipper operator leaders, commodity inspectors and fabricating leaders in Finishing department, maintenance leaders, and truck-

lowing the election the Regional Director served upon the parties a Tally of Ballots which showed that of approximately 279 eligible voters, 269 cast ballots, of which 127 were for, and 139 were against, the Petitioner, 2 ballots were challenged, and 1 ballot was void. Thereafter, the Petitioner filed timely objections to conduct affecting the results of the election.

In accordance with the Board's Rules and Regulations, Series 8, the Regional Director conducted an investigation of the objections and, on September 1, 1960, issued and duly served upon the parties his Report on Objections, in which he found that Objections 1 and 3 had merit and recommended that the election be set aside and a new election held. As to the remaining objections, he found them to be without merit and recommended that they be overruled. The Employer filed timely exceptions to the Regional Director's findings and recommendation, together with a brief in support of such exceptions.

Upon the entire record in the case, the Board finds:[3]

In its Objections 1 and 3, the Petitioner contends that the Employer exceeded the bounds of legitimate campaign propaganda by making certain false and misleading statements to employees which interfered with the freedom of choice in the election. The instant election was held between 6:00 A. M. and 8:00 A. M. and from 2:00 P. M. to 4:00

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drivers, but excluding watchmen, testers, laboratory technicians, quality leaders in Quality department and other technical and professional employees, office clerical employees, storeroom clerks, Forestry department employees, commodity auditors and production schedulers, head boiler operator and relief foreman in Yard and Board Mill department, relief foreman in Press Board department, relief foreman in Finishing department, acoustical operating leaders, hardboard trimmer operators, big trimmer operators, head saw filer and tile machine operators in Finishing department, mechanical loading leaders and relief mechanical loading leader in Warehouse and Shipping department, shift foreman and all other supervisors as defined in the Act.

[3] In the absence of exceptions thereto, we adopt *pro forma* the Regional Director's findings and recommendations that Objections 2, 4, 5, 6, and 7 be overruled and hereby overrule them.

P. M. on July 8, 1960. The investigation revealed that on July 6, 1960, the Employer received two telegrams from the Works Manager of its New Brighton, New York, plant concerning the Company's bargaining relationship at that plant with the District Lodge of this Petitioner which is the certified union at that plant. The first telegram read as follows:

> MEN AT THIS USG PLANT NOW ADMIT THAT BRINGING IN MACHINISTS WAS A COSTLY MISTAKE, NO LOCAL UNION IS RECOGNIZED AND NO EMPLOYEE IS AUTHORIZED TO BARGAIN OR SIGN A CONTRACT. THE INTERNATIONAL BOSS HAS ALL AUTHORITY AND CONTROL. HE MAKES ALL DECISIONS WITHOUT CONSULTING EMPLOYEES. MEN WOULD LIKE WAGE INCREASE BUT UNION SAYS NO. MACHINISTS HAVE PREVENTED WAGE INCREASE HERE FOR 19 MONTHS.

The second telegram stated:

> UNION REPRESENTATIVES DID NOT SHOW UP FOR SCHEDULED MEETING TODAY. I DO NOT KNOW THE REASON AND WILL WAIT UNTIL SOLAR CONTACTS ME REGARDING ANOTHER MEETING.

Copies of the above telegrams were distributed to each of the Employer's supervisors on July 6, and the information contained therein was used in conversations with employees urging them to vote against the Petitioner. The Greenville Works Manager read the contents of the telegrams and commented thereon to at least one group of approximately 45 employees on the afternoon of July 6, 1960. The telegrams were also shown to various employees, and copies were posted on the plant's bulletin boards on July 7, the day before the election.[4] The Petitioner's representative stated that the use of the above telegrams was not brought to his attention until the night before the election.

The Regional Director found that the first telegram, except for the first sentence ("men at this USG plant now

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[4] The Employer has not disputed the accuracy of the above facts found by the Regional Director and summarized herein.

admit that bringing in machinists was a costly mistake"),[5] contained gross misstatements, misleading statements, and deliberate misrepresentations, all calculated to convey to the Greenville employees the impression that the employees at the New Brighton plant had no voice whatsoever in the negotiations and that the Union had willfully prevented the Employer from granting raises at the latter plant. He further found that the information was within the special knowledge of the Employer because of its participation in the New Brighton negotiations and was of a nature that the employees themselves could not evaluate. He also found that the statements were made by a party whom the employees could reasonably consider to be in an authoritative position to know the true facts. With respect to the second telegram, the Regional Director found that its use, considered in context with the contents of the first telegram and the simultaneous posting and circulation, was to bolster and to emphasize the misrepresentations of the first telegram. Accordingly, the Regional Director concluded that the Employer's use of the two telegrams constituted improper election propaganda which prevented the exercise of a free choice by the employees in the election of their bargaining representative, and he recommended that these objections be sustained, the election set aside, and a new election directed.

The general rules which the Board applies to election campaigns are well settled and not in dispute. Exaggerations, inaccuracies, partial truths, name-calling, and falsehoods, while not condoned, may be excused as legitimate campaign propaganda provided they are not so misleading as to prevent the exercise of a free choice by employees in the election of their bargaining representative.[6] Absent threats or other elements of intimidation, the Board will

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[5] As no exceptions were filed to this finding as to the first sentence, we adopt the finding *pro forma*.

[6] *The Gummed Products Co.*, 112 NLRB 1092.

not undertake to police or censor the propaganda material used by the participants in a Board election, and leaves it to the opposing party to correct, and ~~to the~~ employees themselves to evaluate, such utterances. However, when one of the parties deliberately misstates material facts which are within its special knowledge, under such circumstances that the other party or parties cannot learn about them in time to point out the misstatements, and the employees themselves lack the independent knowledge to make possible a proper evaluation of the misstatements, the Board will find that the bounds of legitimate campaign propaganda have been exceeded and will set aside an election.[7]

The Employer contends, in essence, that the Regional Director improperly applied these rules to the facts before him. Specifically, it argues that the use of the telegrams was legitimate campaign propaganda because (1) the signer of the telegram believed some of the statements to be true and they were merely expressions of opinion, (2) the facts were more within the special knowledge of the Petitioner than of the Employer, (3) the statements related to issues raised and discussed during the campaign and must be considered in the context of the campaign, (4) the Petitioner had ample opportunity to answer the statements and did so, (5) the Greenville employees had experienced organizational drives, electioneering, and bargaining, and hence were fully competent to evaluate the truth or falsity of the statements, and (6) the second telegram must be considered separately rather than in conjunction with the first. We find each of these contentions to be without merit.

In support of the truth of the first telegram, the New Brighton Works Manager supplied an affidavit in which he asserted that the representative of District Lodge No. 15, the certified union, had stated that he alone was authorized to negotiate and sign a contract and he made all decisions

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[7] *The Cleveland Trencher Company*, 130 NLRB No. 59; *Kaynecr Company*, 119 NLRB 1460; *The Calidyne Company*, 117 NLRB 1026, 1028.

without consulting the employees. The Employer contends that the telegram therefore stated the facts as the Works Manager believed them to be. But certain of the statements so distort the actual facts as to be misleading because the employees could not properly evaluate them unless the Petitioner had an opportunity to point out the misstatements. Thus, the statement that "['the International boss'] makes all decisions without consulting employees" is contradicted by the aforesaid affidavit of the New Brighton Works Manager which admits that employees sat in the bargaining sessions but "had little or nothing to say."[8] The fact of even limited employee participation was not mentioned in any of the campaign literature quoted by the Employer in its brief and was presumably unknown to the Greenville employees. Knowledge of this fact was essential in order for them to make a proper evaluation of the statement. However, even assuming the telegram stated the facts as they were honestly believed to be, the statements are not couched in terms of an expression of opinion and, contrary to the Employer's view, are clearly not recognizable as such on their face. In this context, the effect on the employees of an unintentional misrepresentation would be no different from that of a deliberate misstatement.[9] We also agree with the Regional Director that the last two sentences were deliberate misrepresentations. Indeed, the Employer has not attempted to argue that they were true, but merely that they were recognizable by the employees as campaign propaganda. For the reasons set forth below, we do not believe that the employees could recognize them as such.

We disagree that the facts were more within the special knowledge of the Petitioner than of the Employer and that the Petitioner had ample opportunity to answer. The as-

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[8] Also, members of the negotiating committee at the New Brighton plant submitted a signed statement to the effect that they have participated in the negotiations.

[9] *Kawneer Company, supra*, footnote 7.

sertions are as to factual events at a location far removed from the Greenville plant. To apply a theory of constructive knowledge or infer actual knowledge by Petitioner's representatives in Greenville under these circumstances would be unrealistic. In any event, we find that it is immaterial which party had special or exclusive knowledge of the facts. The Board will set aside elections because of material misrepresentations of fact "where (1) the employees would tend to give particular weight to the misrepresentation because it came from a party that . . . was in an authoritative position to know the true facts, and (2) no other party had sufficient opportunity to correct the misrepresentation before the election."[10] The Board has also set aside an election because the distribution of misstatements concerning a matter which the employees could not evaluate independently on the 2 days preceding the election gave the Employer insufficient time to learn of and point out the misstatements.[11] Because of the position of the New Brighton Works Manager and his participation in the negotiations at that plant, we find that he was a party in an authoritative position to know the true facts and that the employees would tend to give particular weight to his misrepresentations. And the distribution, discussion, and posting of the telegrams on the 2 days before the election gave the Petitioner insufficient time to learn of and point out the misstatements.[12] While a party is not necessarily entitled to an opportunity to reply to all campaign propaganda, the Petitioner was entitled to such an opportunity under the circumsances of this case. The Employer's prime contention is that the first telegram should be considered in the context of the election campaign and

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10 *Celanese Corporation of America*, 121 NLRB 303, 307.

11 *Kaumeer Company, supra.*

12 *The Lundy Baking Company*, 124 NLRB 905, is clearly distinguishable, in that there the last minute misstatements had also been made 2 months before the election, which permitted the employees ample time to make inquiries if they wished. Here, on the contrary, no such adequate time was available.

the attendant propaganda. We agree. However, we do not agree that when so considered the statements of the first telegram were merely repetitious and understandable or that the Petitioner's previous denials of the Employer's prognostications were sufficient answer and permitted full and proper evaluation by the employees. In this connection the Regional Director found that there was some evidence that during the campaign the Employer had mentioned its contentions that the International would conduct any contract negotiations, but that this issue did not assume a dominant role in the Employer's campaign until the receipt of the July 6 telegram. However, even if the Employer is correct and employee participation was a dominant issue, we find a vast difference between the predictions made prior to July 6 and the statements of fact contained in the July 6 telegram. In fact, such assertions of fact following on the heels of the Employer's forecast would, in our opinion, be given even greater weight by the employees.[13] Under these circumstances, the previous contrary predictions by the Petitioner cannot be said to take the place of an opportunity to deny the asserted facts. Nor do we believe that such prior campaign predictions by the parties enabled the employees properly to evaluate the facts reported in the first July 6 telegram.

The Employer's assertions as to the experience of the Greenville employees in organizational drives, electioneering, and bargaining are completely unsupported by any factual allegations and hence must be rejected. We note,

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[13] Cf. *The Gummed Products Company*, 112 NLRB 1092, 1094. The cases relied on by the Employer in support of its position that in context of the campaign the telegram was permissible propaganda are clearly distinguishable. In *Universal Producing Company*, 123 NLRB 548, the employer's statements were found to be an expression of legal position as to future bargaining. In *Celanese Corporation of America*, *supra*, the union's last-minute campaign release was merely a repetition of its prior claims, which had been answered by the company, but asserted additional matters of the same nature. In *Borders, Incorporated*, 114 NLRB 751, there had been an actual denial by the employer and the union's misstatements were not repeated thereafter.

however, that the Board's records reveal no prior petitions involving the employees at the Greenville plant during the past 6 or 7 years. The experience of employees at other plants of this Employer cannot be attributed to the employees at the Greenville plant.

The Employer's final contention, that the second telegram must be considered separately, is also rejected. This telegram, like the first, should be considered in the context of the events. When so viewed, it is clear that the Regional Director's findings with respect to its improper use were correct, and we therefore adopt them.

In view of the foregoing, we find that the Employer's use of its telegrams exceeded the bounds of legitimate campaign propaganda and lowered the standards of campaigning to a level which impaired the free and untrammeled expression of choice by the employees. Accordingly, we shall order that the election of July 8, 1960, be set aside, and shall direct that a new election be held.

Order

It Is Hereby Ordered that the election conducted herein on July 8, 1960, be, and it hereby is, set aside.

Direction of Second Election

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to

vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[14] Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes, by International Association of Machinists, AFL-CIO.

Dated, Washington, D. C., Feb. 28, 1961.

JOSEPH ALTON JENKINS, *Member*
JOHN H. FANNING, *Member*
ARTHUR A. KIMBALL, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN LEEDOM and MEMBER RODGERS, dissenting:

We believe that the majority has misapplied existing precedents to the facts in this case. The main thrust of the first telegram in question[15] is the charge that during negotiations for a contract at another plant of the Employer, the "International Boss," the Petitioner herein, had usurped the bargaining authority to the detriment of the employees. Such a charge, involving a matter about which both the Employer and the Petitioner had equal knowledge, constitutes an expression of opinion or ultimate conclusion by the Employer, as to its version of the negotiations between the Petitioner, together with its Local, and Employer. That this version may have differed from

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[14] Employees engaged in an economic strike which began less than 12 months from the date of the election who have been permanently replaced and their replacements shall vote by challenged ballot.

[15] The second telegram also relied upon by the majority is, in our opinion, obviously innocuous.

that of the Petitioner, or that a different conclusion might have been reached, affords no basis for setting aside election, or surely on the basis of form and content the employees could readily evaluate the telegram as mere self-serving propaganda which could reasonably be expected in a hotly contested election.[16]

Moreover, we note that the discussion of the telegram with the employees commenced two days before the election and it was posted on the bulletin board the day before. Its content was therefore a matter of common knowledge throughout the plant. It is inconceivable that the Petitioner, which had 127 adherents in the plant, was not informed of the telegram until the night before the election. But even so, there was still opportunity to counter the Employer's telegram, as the Petitioner, a party to the negotiations, had all relevant information on hand. Its failure to act convinces us that it then regarded the telegram as not being a material factor in the election and that it changed its mind only after the adverse election results were made known.

For these reasons we would overrule the objections and certify the results of the election.

Dated, Washington, D. C.

BOYD LEEDOM, *Chairman*
PHILIP RAY RODGERS, *Member*

NATIONAL LABOR RELATIONS BOARD

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[16] In our opinion, the case of *Cleveland Trencher Co.*, 130 NLRB No. 59, relied upon by the majority to support its decision, is factually distinguishable. That case involved misrepresentations as to matters within the special knowledge solely of the party making them, and the Board (*Members Jenkins and Fanning* not participating) concluded that the employees were unable to evaluate such misrepresentations. Here, the matters allegedly misrepresented were within the special knowledge of both parties to the proceeding.